IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

WRIT PETITION NO.3050 OF 2004.

Mtz. Industries and Anr.

...Petitioners.

Versus.

New India Assurance Co.
Ltd and Ors.

..Respondents.

Mr. D. D. Madon i/b Rustamji U. Ginwala for the petitioners.

Mr. Saumen S. Vidyarthi i/b S.M. Vidyarthi for respondent No. 1 and 2.

CORAM :H.L.GOKHALE &
S.R.DONGAONKAR.JJ.
DATE :12/04/2006.

P.C.

1] Heard Mr.Madan, Senior Advocate in support of this petition. Mr. Vidyarthi appears for the respondents No.1 & 2. The petitioners seek to challange the communication dated 18th May, 2004 from the respondents no.1 and 2 rejecting the insurance claim made by petitioner on account of the fire which is said to have occurred at their factory on 19th August, 2003. The petitioners are supposed to be having a factory at the Industrial Estate area on Kalyan-Bhivandi road in district Thane and it is their case that the factory and the stock were covered under the Insurance Policy with the first

respondent. They lodged their claim for the loss of raw material and finished goods to the tune of Rs. 2.23 Crores and the plant and machinery to the tune of Rs. 23.34 lakhs.

2] The respondents have rejected this claim by their impugned letter dated 18th May,2004. The rejection letter gave three major reasons, which were as follows:

a) The petitioners claim a loss of 222 Mts. of Sulphur and 40 tonnes of Naphthalenes Crude as reported by the surveyors of the respondent no.1. The burn of such high quantity of Sulphur and Naphthalenes would have resulted into major fire causing severe environmental pollution and damage to the people living nearby. Nothing of that kind was reported.

b) Second ground was given that the Surveyor of respondent no.1 wanted to peruse the record of another unit of the petitioners which according to the respondents was required to assess the quantum of material in the Bhivandi factory. Access was denied to the Surveyor.

c) The third ground given is that the policy describes the situation of the property as plot No.9/N/1, MIDC Industrial Area, Kalyan Bhivandi road, Saravali, Bhivandi, district Thane.The lease agreement of the insured with MIDC described the property as plot No. 8-B. Thus, there was doubt with respect to the exact location and the stocks, where the damage took place, and the storage. Same was not specifically mentioned in the policy.

The respondents have filed reply and have stated amongst others that disputed questions of facts arise in this matter and therefore, obviously the correct remedy is to file a suit. They contend that these questions can not be considered and decided in writ jurisdiction. The petitioners have filed their rejoinder to this reply.

3] Mr. Madon, learned counsel appearing for the petitioners relied upon a judgment of the Apex Court, in the case of - ABL International Ltd. & Anr. Vs. Export Credit Corporation of India and Ors. reported in JT 2003(10) SC 300 and particularly paragraph 19 thereof which states that merely because one of the parties to the litigation raises a dispute in regard to the facts of the case, the court entertaining such petition under Art.226 was not bound to always relegate a party to a suit. He referred to para 27(a) thereof which states that in appropriate cases a writ, arising out of contractual obligations is maintainable against the State or its instrumentality. He referred to the report of the Fire Officer to contradict the stand taken by the respodents. Mr. Madon submitted that the respondents are trying to defend their case by

relying upon the surveyor's report, which was subsequent to their letter of repudiation and then relied upon paragraph 8 of the judgment of the Apex Court in the case of Mohinder Singh Gill and Anr. Vs. The Chief Election Commissioner, New Delhi and Ors.reported in AIR 1978 SC 851 , to submit that the reasons in an order cannot be supplemented by fresh reasons in the shape of affidavit.

4] Mr. Vidyarthi , learned counsel for the respondents, on the other hand, relied upon the judgments of the Apex Court to the effect that where a claim is repudiated, the High Court has to consider the facts and circumstances of the case, and particularly where a claim is based on contract of insurance, normal remedy is to file a suit. He referred and relied upon paragraph 10 of the judgment in L.I.C. of India Vs. Asha Goel 2001 ACJ 806 and LIC Vs. Kiran Sinha, 1985 ACJ 657 in that behalf.

5] He invited our attention to the report of the surveyor/investigator wherein he has clearly given a opinion that the fire could not be termed as an accident. In answers to queries he referred to the report of an Associate Professor

from the Department of Chemical Engineering, IIT, Mumbai, dated 20th May, 2004, as to whether such quantity of Sulphur Dioxide was hazardous and what would be the consequences if it was gutted. The Professor has replied that if such quantity was released into the environment, it was likely to prove highly hazardous and atleast there was 50% chance of human fatality resulting at a distance of 500 meter and near to the source of accident chance of individual fatality would be 100%. Nothing of the kind had happened in the present case raising doubts about the fire and the alleged loss.

6] We have considered the submissions of both the counsel. In our view, this is a clear case where the respondents have a defence and they should get an opportunity to establish it on evidence. They can get proper opportunity only if they are permitted to lead oral and documentary evidence. Even in case of a tort of negligence the questions arising are to be properly decided by oral evidence and not by affidavits as observed by the Apex Court in paragraph no. 6 of the judgment in Chairman, Grid Corporation of Orissa Ltd. (Gridco) and others V. Sukamani Das (Smt.) and another

reported in 2000 (2) TAC 168.

7] In the present case, there are disputed questions of fact as to where the exact location of factory was, as to how much was the stock and as to whether the fire was accidental or otherwise, how much was the loss and whether ultimately the respondent-Insurance Company was liable to compensate and to what extent. Surely they cannot be decided merely on affidavits in a writ petition. The proper remedy for the petitioners is to file a suit. Hence we decline to entertain this writ petition and dismiss the same.

(H.L.GOKHALE.J.)

(S.R.DONGAONKAR.J.)